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No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL.,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Respondents.

BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the railroads' petition for certiorari in this case are patently specious, baseless and grossly misleading. The huge, *special,* discriminatory rate increases imposed on recyclables *after* April 16, 1979—*while this case was pending before the Court of Appeals for review under Section 204 of the Railroad Revitalization and Regulatory Reform Act* (49 U.S.C. 10731)—were unanimously revoked by the Court of Appeals because the Court specifically found that each of said rate increases was *unlawfully imposed by the railroads, in total violation of Section 204,* in response to portions of the Commission's final decision of April 16, 1979 in this case, which were *vacated* and *set aside* by the Court of Appeals upon review.

The Court of Appeals did *not* disregard controlling decisions of this Court, as the railroads allege in their "questions presented." On the contrary, the Court of Appeals' action is fully in accord with prior decisions of this Court, *infra.* As the Court of Appeals stated when it denied the railroads' motion for a stay of the challenged orders:[1]

> "We deny the requested stay because the rate increases involved, which we have ordered vacated, were made in violation of our previous decision. The authority of a court extends to vacating actions taken in violation of the court's orders. To grant the requested stay would be to nullify our own decisions, now twice taken."

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[1] Appendix F to the petition for writ of certiorari.

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v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
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BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents National Association of Recycling Industries, Inc. (NARI), Bergstrom Paper Company, Commercial Metals Co., Frankel Bros. & Co., Inc. and U.S. Reduction Company hereby submit this brief to the Court in opposition to the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the railroads, and they respectfully urge the Court to deny such petition for certiorari.

STATUTES INVOLVED

The statutes involved in this case are as follows:

(A) Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, § 204,

as originally enacted by Congress and as here pertinent,[2] provides;

> "*Investigation Of Discriminatory Freight Rates For The Transportation Of Recyclable Or Recycled Materials*
>
> "(a) Investigation—The Commission, within 12 months after the date of enactment of this Act, and thereafter as appropriate, shall—
>
> "(1) conduct an investigation of (A) the rate structure for the transportation, by common carriers by railroad subject to part I of the Interstate Commerce Act, of recyclable or recycled materials and competing virgin natural resource materials and (B) the manner in which such rate structure has been affected by successive general rate increases approved by the Commission for such common carriers by railroad;
>
> "(2) determine, after a public hearing during which the burden of proof shall be upon such common carriers by railroad to show that such rate structure, as affected by rate increases applicable to the transportation of such competing materials, is just, reasonable and nondiscriminatory, whether such rate structure is, in whole or in part, unjustly discriminatory or unreasonable;
>
> "(3) issue, in all cases in which such transportation rate structure is determined to be, in whole or in part, unjustly discriminatory or unreasonable, orders requiring the removal from such rate structure of such unreasonableness or unjust discrimination; and
>
> "(4) report to the President and the Congress . . . all actions commenced or completed under this section to eliminate unreasonable and unjustly discriminatory rates for the transportation of recyclable or recycled materials . . . .
>
> "(d) Review—Orders issued by the Commission pursuant to this section shall be subject to judicial

[2] Section 204 of the 1976 Act was recodified by Congress in 1978, and in that form it is found at Title 49 U.S.C. § 10731.

review or enforcement in the same manner as other orders issued by the Commission under the Interstate Commerce Act . . . ."

(B) Title 28 of the United States Code, § 2342 (5), which states:

"*Jurisdiction of court of appeals.* The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of— . . .

"(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title."

COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

This same case between the same parties was before this Court last term (*Atchison, Topeka & Santa Fe R. Co.* v. *National Association of Recycling Industries, Inc.*, No. 78-872). At that time, the railroads similarly sought certiorari to review orders issued by the United States Court of Appeals for the District of Columbia Circuit, the purpose of which was to enforce the Congressional mandate found in Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, *supra,* entitled "Investigation Of Discriminatory Freight Rates For The Transportation Of Recyclable Or Recycled Materials," and to prevent the railroads and the Interstate Commerce Commission from frustrating and defeating the urgent Congressional directives contained in that statute for the removal of all unreasonable, discriminatory freight rates and rate increases that impede the movement of recyclable materials in the United States.[3]

Chief Justice Burger denied the railroads' application for stay of the Court of Appeals' orders in those 1978-1979 proceedings, and shortly thereafter, this

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[3] See Court of Appeals' 1978 decision and order in this case in *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission,* 585 F.2d 522 (1978).

Court denied the railroads' petition for certiorari (*Atchison, Topeka & Santa Fe R. Co.* v. *National Association of Recycling Industries, Inc.*, 440 U.S. 929, 99 S.Ct. 1266 (1979)).

The railroads' current petition for certiorari is far more mischievous, misleading and unjust than even the petition for certiorari they filed in the 1978-1979 proceedings, which was rejected by the Court as aforesaid. It patently misrepresents the true facts and, if granted, it threatens effectively to nullify all remedial actions finally belatedly taken in this case to accomplish, after almost five (5) years of constant, costly litigation, the clear Congressional directives contained in Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976.

Moreover, any action this Court might now take to delay or reverse the Court of Appeals' orders under Section 204 of the 1976 Act in this case, as prayed by the railroads, would clash head-on with the Staggers Rail Act of 1980,[4] the railroad deregulation statute just enacted by Congress this past October, which compels further immediate rate reductions for recyclables *in addition* to those recent unlawful rate increases revoked by the Court of Appeals in this case under the 1976 Act. In this regard, Congress, which mandated in the 1976 Act that all unreasonable, discriminatory freight rates and rate increases for recyclables be removed from the rate structures *within a year* from February, 1976 (i.e., by February, 1977), grew increasingly impatient and dissatisfied with the complete lack of results as this case before the Commission and the courts dragged on without any effective rate reductions for recyclables for almost five (5) years. Thus, just a few weeks ago, in October, 1980, it enacted

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[4] Appendix E, petition for writ of certiorari, signed into law by the President on October 7, 1980, the date the petition for certiorari was filed in this Court.

another statute, Secton 204 of the Rail Act of 1980, which reads as follows:[5]

> "Sec. 204. Section 10731 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:
>
> "(e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron and steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds the average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirement of this subsection."

Senate Report No. 96-470, issued in support of this new 1980 statutory provision, initially describes why Congress enacted Section 204 of the 1976 Act and why it is imperative for the Federal Government immediately to eliminate all unreasonable, discriminatory rail freight rates that have historically impeded industrial recycling in the United States,[6] as follows:

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[5] Appendix E, pg. 7(e), petition for writ of certiorari.

[6] Appendix I to this brief, *infra*.

"It has been an established national policy, since at least 1965, to encourage and assist in the development and promotion of the collection, transportation, processing and industrial utilization of recyclable materials . . . .

"The freight rate issue has been a key in legislation attempting to encourage increased recycling as a way to mitigate the problem of energy and resource conservation. Rail freight rates are an important factor in the economics of recycling. Often the rates on these commodities equal or substantially exceed the value of the recyclable materials and thereby make it economically impossible for these materials to be marketed competitively. This is inconsistent with the national interests incorporated in . . . the energy-resource legislation described above.

"This Committee and Congress, through Section 603 of the Regional Rail Reorganization Act of 1973 and Section 204 of the 4R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless such rate disparities were cost justified, they were to be eliminated without regard to the railroads' revenue needs."

The Senate Report then goes on to describe why it was necessary for Congress to enact the new 1980 legislation set forth hereinabove, and to establish a legislative "upper limit on rates for recyclable commodities." In this regard, the report states:[7]

"The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear Congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978. In response to the

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[7] Appendix I hereto, *infra*.

> Court's remand . . . the Interstate Commerce Commission recently proposed to place a 'cap' on freight rates for recyclables at 180 percent of [the railroads'] variable cost. At the time this 'cap' was imposed, it exceeded the average revenue/variable cost level for all traffic moving by rail by 53 points, [and] the rebuttable market dominance presumption under the Commission's rules by 20 points . . . The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed 'cap.'
>
> "It is therefore the Committee's belief that, after a full 6 years since the clear mandate to remove these economic barriers to the promotion of recyclable materials was first issued, *it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory proscription.*
>
> "The Committee's provision is quite simple: *It merely reduces the Commission's cap on recyclables from the 180 percent revenue/variable cost ratio level to . . . the estimated level of 140 percent to 160 percent, to be established under this section . . . .*
>
> "This level, however, will represent a '*maximum level of reasonableness*' for recyclables, and as long as rates charged for the transportation of these materials of such vital importance to the United States are at this level, there can be no further rate increases . . . ." [Italics supplied.]

In the final analysis, therefore, contrary to allegations contained in the railroads' petition for certiorari, Congress has *not* left the railroads free to impose whatever rates—and whatever rate increases—they may choose to charge shippers of recyclable materials. Since 1976, Congress has made it crystal clear that rates for recyclables are unlawful—

(a) if they are discriminatory when measured against rates and rate increases for compet-

ing virgin natural resource counterparts, or

(b) if they are in any respect unreasonable—

and, under Section 204 of the 1976 Act, such unlawful rates and rate increases must *forthwith* be *removed* from the rate structures, *as the Court of Appeals ordered in this case.* Now, in 1980, Congress has expressed its utter frustration and dissatisfaction with the outrageous failure and refusal of *both* the Commission and the railroads to comply with the statutory mandate contained in the 1976 Act by imposing—*for perhaps the first time in ICC history—a legislative "cap" on freight rates for any commodity.* This is especially significant since the new "cap" on recyclables was included in the 1980 legislation which otherwise substantially deregulates railroad ratemaking.

Plainly, therefore, this is a completely unique case wherein the Court of Appeals, after almost five (5) years of continuous litigation and Commission investigations under Section 204 of the 1976 Act, and after two (2) successive judicial review proceedings, properly and unavoidably exercised its equity powers to compel the removal of unlawful rate increases imposed in flagrant violation of repeated mandates of Congress.

Under the circumstances, respondents respectfully submit this is not a case wherein this Court should grant certiorari and thus interfere at this late date with the equitable relief the Court of Appeals necessarily provided after lengthy proceedings to preserve the integrity and vitality of both its own prior decisions in this case and the underlying directives of the Congress.

B. The Correct, Applicable Facts

With the Court's indulgence, respondents will now set forth a correct counter-statement of the facts which are actually applicable to the pending petition for certiorari.

During the ten-year period from 1967 through 1977, the railroads sought and the Interstate Commerce Commission approved general rate increases applicable to recyclable materials totaling approximately 70%.[8] Shippers of recyclables and representatives of the recycling industry repeatedly appeared before the Commission and opposed said increases, contending the base rate structures for recyclables were already unreasonably high and grossly discriminatory when compared with the lower rates and rate increases prevailing on competing virgin natural resource materials, and thus, each rate increase was exacerbating the existing unreasonableness and discrimination.[9] They also maintained that application of the proposed increases to recyclables would adversely affect the environment by discouraging industrial use of recycled products, thereby contributing to depletion of the nation's virgin resources and energy supplies.[10]

The Commission consistently ruled that issues of that nature were irrelevant in general rate increase proceedings, and it approved the increases sought solely because it felt the railroads need the revenues.[11] Environmental groups sought to enjoin one of that series of general rate increases on the ground it was approved by the Commission in violation of the procedural requirements of the National Environmental Policy Act of 1969 (NEPA), but this Court ruled that mere procedural noncompliance with NEPA was not a sufficient ground for enjoining a general rate increase before its actual lawfulness, as specifically applied to recyclables, was determined by the Commis-

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[8] See *National Association of Recycling Industries, Inc.* v. *ICC*, at 585 F.2d 526.

[9] *Id.*, at pg. 526.

[10] *Id.*, at pg. 526.

[11] *Id.*, at pp. 526-527.

sion (*United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

The Commission, however, continued steadfastly to refuse to conduct an investigation into the lawfulness of the underlying rate structures on recyclables.[12] In December, 1973, therefore, Congress enacted Section 603 of the Regional Rail Reorganization Act of 1973 (49 U.S.C. 10710) which provided:[13]

> "Elimination of discrimination against recyclable materials.
>
> "The Interstate Commerce Commission shall maintain regulations that will eliminate discrimination against the transportation of recyclable materials in rate structures and in other Commission practices where discrimination exists."

The Commission virtually ignored the statutory message contained in Section 603.[14] Moreover, the Commission approved another series of general rate increases applicable to recyclables totaling 38% over a two-year span (1974-1975),[15] while this Court again upheld the ICC's general rate increase procedures under NEPA, and stressed that the lawfulness of base rates and rate increases on recyclables should be determined in a separate investigation (*Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.* (*SCRAP II*), 422 U.S. 289, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975)).

Congress thus acted for the second time. In 1976, shortly after this Court's decision in *SCRAP II,* it enacted Section 204 of the Railroad Revitalization and Regulatory Reform Act, which is printed verbatim in the "Statutes Involved" section of this brief, *supra.*

Responding to this new, forceful Congressional mandate, the Commission promptly commenced ***Ex Parte***

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[12] *Id.*, at pg. 527.

[13] P.L. 93-236, § 603 (1973).

[14] *NARI* v. *ICC,* 585 F.2d., at pg. 532.

[15] *Id.*, at pg. 532.

319—Investigation Of Freght Rates For The Transportation Of Recyclable Or Recycled Materials. The evidence thereafter submitted by the railroads in that case was repeatedly criticized as absolutely inadequate and misleading by the federal agencies participating in the investigation, and by the Commission itself in its final report.[16] That evidence did indicate, however, that (a) rates for recyclables were significantly higher than those for their virgin resource material counterparts, (b) rates on recyclables were far in excess of the national average rates for all traffic moving by rail, while (c) the corresponding rates on virgin materials were far below the national average, and in many instances, they were noncompensatory (i.e., lower than the railroads' costs for that traffic).[17] Nevertheless, the Commission arbitrarily and capriciously refused to rule that the rates on recyclables were unlawful.[18] Three (3) Commissioners vigorously dissented, arguing (1) the majority had relieved the railroads of their statutory burden of proof under Section 204, and (2) the majority had plainly failed to comply with the Commission's mandate from Congress under Section 204.[19]

Upon review, the Court of Appeals reversed and remanded the case to the Commission, holding the Commission's decisions did not represent a reasoned compliance with Section 204 of the 1976 Act (*National Association of Recycling Industries, Inc.* v. *ICC,* 585 F.2d 522 (1978)). The railroads' application for a stay of the Court of Appeals' decision was denied by the Chief Justice, and this Court denied certiorari (*Atchison, Topeka & Santa Fe R. Co.* v. *National Associa-*

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[16] *Id.*, at pg. 529.

[17] *Id.*, at pp. 529-530.

[18] *Id.*, at pg. 530.

[19] *Id.*, at pg. 530.

tion of Recycling Industries, Inc., 440 U.S. 929, 99 S. Ct. 1266 (1979)).

Upon remand, the Commission requested new cost data from the railroads, but the railroads failed to supply it.[20] The Commission thus utilized the original *Ex Parte 319* data; updated that data; and concluded from other evidence submitted by the railroads "that rail freight rates do have an effect on the movement of recyclables."[21] The Commisson thereupon found from the railroads' evidence that certain rates on recyclables were discriminatory and that others were unreasonable.[22]

On the issue of *reasonableness,* the Commission ruled that the revenue-to-variable cost ratio level of 180%—i.e., where railroad revenues exceed costs by 80%—is the *"maximum standard of reasonableness"* for rates on recyclables, and ordered rates above that level reduced.[23]

However, the Commission also construed Section 204 of the 1976 Act to *permit it to license the railroads to raise all rates on recyclables below the 180% level to that "maximum standard of reasonableness"—which, in fact, is at the very top of the entire national freight rate spectrum*—and thus, the railroads, *though urged by the Commission not to raise recyclable rates,* proceeded *en masse* to do just that.[24] As described by Judge Wilkey in the Court of Appeals' opinion of April 25, 1980 in *NARI II*:[25]

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[20] See *NARI* v. *ICC* (NARI II), Appendix C, petition for certiorari, pg. 9c.

[21] *Id.*, at pp. 9c, 10c.

[22] *Id.*, at pp. 9c-10c.

[23] *Id.*, at pg. 11c.

[24] *Id.*, at pp. 12c, 21c. See also *Ex Parte 319—Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials*, 361 ICC, 641, 649-50 (1979).

[25] *Id.*, at pg. 21c.

"As we discuss below, the Commission established a reasonableness standard at a 180 percent ratio of revenue to variable cost. To remedy discrimination wherever it is found between competing groups of recyclable and virgin commodities, the railroads are thus permitted to adjust rates so that revenue-cost ratios are equal between the two groups, and below 180 percent. *In this manner railroads have been able to remedy discrimination by means of large rate increases for both virgin and recyclable materials. In fact, the Commission has allowed rate increases for recyclables whenever the revenue cost ratio is below 180.*" [Italics supplied.]

The Court of Appeals, relying on the Congressional mandate contained in Section 204 of the 1976 Act and this Court's decision in *American Express Co.* v. *Caldwell,* 244 U.S. 617 (1917), unanimously reversed the Commission's and railroads' arbitrary, capricious "remedial" actions in this respect, stating:[26]

". . . The clear congressional intent behind section 204 was to remove barriers to increased levels of recycling, if such barriers should be found to exist. *Now that the Commission has found unjust discrimination against recyclables,* it would surely be ironic for this finding to *result in an increase in the rates or 'barriers' for such materials.* We hold, therefore, in light of expressed congressional intent, that the language in *American Express* limiting remedies for discrimination is applicable to this section 204 proceeding. *We must accordingly vacate the Commission's decision as to remedies for unjust discrimination, and require that remedies result in equalization of ratios at a level not higher than the original ratio for recyclables which was found to be discriminatory . . . .*

"Where railroads have already 'remedied' discrimination by increasing recyclable rates, however, these increases must be revoked as inconsistent with the extent of the Commission's au-

[26] *Id.,* at pg. 23c.

thority to remedy discrimination under section 204 . . . ." [Italics supplied.]

Regarding the 180% "maximum standard of reasonableness" established by the Commission under Section 204, Judge Wilkey, writing for the unanimous Court of Appeals, ruled:[27]

> "On the present record, however, we find a disturbing lack of support and explanation for the 180 percent ratio which the Commission selected . . .
>
> ". . . [W]e find the Commission's decision simply too arbitrary and unreasoned to uphold . . . .
>
> "Because of the complete lack of . . . explanatory discussion of fundamental considerations, we must vacate the Commission's choice of a 180 percent ratio standard for reasonableness, and remand for the Commission to hold further proceedings to define what rates for recyclables are unreasonable. *Any increase in ratios for recyclables toward the 180 percent level, made by the railroads as a result of and in relation to the Commission's decision of 16 April 1979, must be revoked until such time as the ICC issues a new determination of what rates are reasonable.* This required revocation does not, of course, affect general rate increases." [Italics supplied.]

The record before the Court of Appeals showed that, during the short period of just one (1) year from April 16, 1979 (when the Commission rendered its decision on remand in *Ex Parte 319*) and April 25, 1980 (when the Court of Appeals rendered its aforesaid decision), the railroads, *relying solely on the Commission's arbitrary, capricious rulings in Ex Parte 319 which were vacated and set aside by the Court of Appeals as aforesaid in this case,* voraciously singled out recyclables for the imposition of a wholesale series of huge "*special rate increases*" in violation

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[27] *Id.*, at pp. 25c-27c.

of Section 204 of the 1976 Act. For some extremely low value, difficult-to-recycle commodities, like wastepaper, textile waste and rubber, these unlawful *"special remedial increases"* amounted to more than 50% in less than a year.[28]

In two (2) other separate court of appeals review proceedings, where certain of those special, discriminatory increases thus imposed by the railroads pursuant to the Commission's decision of April 16, 1979 in *Ex Parte 319* were separately challenged by respondent NARI in the District of Columbia and Eighth Circuits, the two Courts both suggested that NARI seek revocation of the challenged increases in this case, where the Commission's actions in *Ex Parte 319* could be more directly remedied (*National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission,* CCA, D.C., Nos. 78-1680 and 78-2074 (*NARI III*); *Union Electric Company* v. *United States; National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission,* CCA8, 626 F.2d 1348, 1355-58 (1980)).

Finally, therefore, in response to a petition for rehearing and clarification filed by NARI in this case, the Court of Appeals unanimously rendered its order of August 15, 1980, which is challenged by the railroads' petition for certiorari herein, as follows:[29]

> "Having ruled that railroad rates discriminating against recyclable commodities could not be remedied by raising recyclable rates to equal those charged virgin materials, the Court held that all such 'remedial' increases must be revoked. The Court also ordered the Interstate Commerce Com-

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[28] See Appendix II to this brief, *infra,* which contains a detailed list of the special, discriminatory rate increases the railroads unlawfully imposed on shippers of recyclables throughout the United States while this case was pending before the Court of Appeals for review.

[29] Appendix B to the petition for writ of certiorari.

mission to review all railroad rate changes made to remedy discrimination in order to ensure that the resulting increases were not unreasonably large.

"In addition, the Court held that the Commission could no longer use a 180 percent revenue-variable cost ratio as its standard of reasonableness. It was first required to conduct further proceedings to define what rates for recyclables were unreasonable. In the meantime, all increases in ratios for recyclables toward the 180 percent level which were imposed since the Commission's decision of April 16, 1979 were to be revoked. The Court excepted general rate increases from this revocation.

"It was the Court's intent that the first order of priority be the reconsideration of the definition of reasonableness. Until that standard is set, the Commission obviously cannot review rate changes to determine which are unreasonably large. Similarly, until the standard is set, railroad rate increases which may be discriminatory or unreasonable may not stand. The Court intended that the opinion filed in this Court would prohibit any such increases in recyclable rates from those in force in April, 1979—until the Commission has formulated an appropriate measurement of reasonableness. By leaving room for general rate increases—*that is, those applied uniformly to all commodities —the Court did not mean to allow the Commission to circumvent or delay implementation of our opinion by permitting all sorts of rate increases to which only recyclables are subject.*

"The Court again directs the Interstate Commerce Commission to proceed in an orderly fashion with determining a standard of reasonableness of recyclable shipping rates. *Pending completion of that effort, those rate increases which have not been applied to virgin materials as well as recyclables are revoked.*" [Italics supplied.]

The railroads applied to the Court of Appeals for a stay of said order pending the filing of the instant

petition for writ of certiorari, but the Court denied that application, stating:[30]

> "We deny the requested stay because the rate increases involved, which we have ordered vacated, were made in violation of our previous decision. The authority of a court extends to vacating actions taken in violation of the court's orders. To grant the requested stay would be to nullify our own decisions, now twice taken."

The railroads thereupon applied to the Chief Justice for a stay pending certiorari, but, on September 25, 1980, the Chief Justice denied that application.

On October 7, 1980, the President signed The Staggers Rail Act of 1980, *supra,* Section 204 of which establishes a "cap" on freight rates for recyclables, initially at least, at the 140% to 160% Revenue/Variable Cost Ratio level—i.e., 20 to 40 points *below* the 180% "maximum standard of reasonableness" set by the Commission in *Ex Parte 319,* but vacated and set aside by the Court of Appeals as aforesaid.

ARGUMENT

Summary of Argument

Prior decisions of this Court make it plain that, under the unique, compelling circumstances of this case, the Court of Appeals had the equitable power to order the removal of patently *unlawful,* crushing rate increases, imposed by the railroads upon shippers of recyclables throughout the United States *while this case was before the Court of Appeals for judicial review,* in order to preserve the integrity of the Congressional mandate contained in Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 10731), as well as to protect the Court of Appeals' jurisdiction—especially since the Court of Appeals simultaneously vacated and set aside

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[30] Attachment F to petition for writ of certiorari.

the Commission's rulings under Section 204 of the 1976 Act which formed the basis for the unlawful rate increases imposed by the railroads, and shortly thereafter, the Court's actions were reinforced and decisively affirmed by a new Act of Congress (*Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 806, 819, 93 S.Ct. 2367, 2374, 2381, 37 L.Ed.2d 350 (1973); *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4, 9-10, 62 S.Ct. 875, 880 (1942); *Arrow Transportation Co.* v. *United States,* D.C. Ala. 1959, 176 F. Supp. 411, 421, *aff'd.* 361 U.S. 353, 80 S.Ct. 406 (1960)).

In such cases, a federal court may adjust its relief to the exigencies of the case in order "to secure a just result with a minimum of technical requirements" (*Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373, 59 S.Ct. 301, 307 (1939)). It may exercise its equitable powers to provide an effective, fair remedy, so long as the court remains within the bounds of the statute before it—in this case, Section 204 of the 1976 Act, which mandates prompt *removal* of all unlawful, unreasonable, discriminatory rates and rate increases for recyclable materials (*Indiana and Michigan Electric Co.* v. *Federal Power Commission,* 163 U.S. App. D.C. 334, 344, 346, 502 F.2d 336, 346 (1974); *Sharon Steel Corporation* v. *Environmental Protection Agency,* CCA3, 1979, 597 F.2d 377, 381). Here, the Court of Appeals' order, which directed the *removal* of unlawful rate increases imposed on shippers of recyclables while this case was pending before the Court, is "within the bounds of the statute" before the Court—indeed, the Court's order effectuated the essential Congressional purpose and intent of that statute.

Thus, the crucial differences between this case and *United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), *Aberdeen &*

Rockfish Ry. Co. v. *S.C.R.A.P. (SCRAP II)*, 422 U.S. 289 (1975), *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) and *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979)—cases relied on by the railroads in their petition for certiorari—are:

1) Here, Congress enacted Section 204 of the 4R Act of 1976 to mandate the *removal* of all unlawful, unreasonable, discriminatory rates and *rate increases* for recyclables within one (1) year (i.e., by February, 1977);

2) Here, pursuant to that statute, the Commission conducted a lengthy, five-year investigation into the rate structures for all recyclables, and ruled, on April 16, 1979, that rates for numerous classes of recyclables were discriminatory, unreasonable and unlawful, and thus the Commission ordered the railroads *"to remedy"* all such *unlawfulness*;

3) Here, the railroads thereupon allegedly proceeded *"to remedy"* such *unlawfulness* by inflicting a series of crushing, new, discriminatory rate increases on recyclables while the Commission's decision of April 16, 1979 was before the Court of Appeals for judicial review under Section 204(d) of the 1976 Act, thus seriously exacerbating the existing unlawfulness established by the Commission itself before the Court could complete the review process;

4) Here, therefore, the Court of Appeals, in line with the mandate contained in Section 204 of the 1976 Act, was constrained to order the *removal* of such *unlawful* rate increases thus imposed by the railroads in violation of Section 204, in order to preserve the integrity of Section 204 and to protect its own jurisdiction.

The Court of Appeals' order was directed at specific rate increases *already imposed or already officially*

proposed by the railroads. It was not aimed vaguely at "future rate increases," as the railroads contend—albeit now, such "future rate increases" have been effectively restrained by Section 204 of the Staggers Rail Act of 1980, enacted by Congress this past October.

Finally, the Court of Appeals' order was fully supported by the findings contained in the Court's lengthy opinion of April 25, 1980 and the findings contained in the order of August 15, 1980 itself. Moreover, in light of Section 204 of the 1976 Act and Section 204 of the Rail Act of 1980, the Court's order is plainly in the public interest.

I. In This Case, The Commission Itself, After Almost Five (5) Years Of Investigation And Litigation Under Section 204 Of The 4R Act Of 1976, Ruled That Existing Rates On Recyclables Were Unreasonable, Discriminatory And Unlawful, But The Commission Permitted The Railroads Illegally "To Remedy" That Unlawfulness By Drastically Increasing Rates On Recyclables Before The Court Of Appeals Could Complete Judicial Review Of The Commission's Decision. Under Such Circumstances, Prior Decisions Of This Court Make It Clear That The Court Of Appeals Had The Equitable Power To Order The Removal Of Such Unlawful Rate Increases To Preserve The Integrity Of The Congressional Mandate Found In Section 204 Of The 1976 Act, As Well As To Protect The Court's Jurisdiction. Thus, This Is Not A Case That Warrants Certiorari.

In the case at bar, the record is clear. After almost five (5) years of continuous investigation and litigation under Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, the Interstate Commerce Commission itself rendered a decision on April 16, 1979 which found that rates on various recyclable commodities were *unreasonable, discriminatory* and *unlawful* [31]—and the Commission directed the rail-

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[31] Appendix D to petition, pp. 16d, 21d, 24d, 25d, 28d, 30d, 32d.

roads *"to remedy"* that unlawfulness as mandated by Section 204.

Instead of *"removing"* the unlawful rates as required by Section 204, the railroads thereupon *"remedied"* the existing unlawfulness by diabolically imposing a series of huge, new, discriminatory special rate increases on recyclables while this case was pending before the Court of Appeals for judicial review of the Commission's decision of April 16, 1979—and they thereby exacerbated the existing unlawfulness and created new, unlawful rate unreasonableness and discrimination for recyclables in violation of that statute.

Faced with these emergency circumstances—in a case where the Commission had already found the base rate structures as of April 16, 1979 to be *unlawful* —the Court of Appeals obviously had the full, inherent judicial power to rule that "all such 'remedial' increases must be revoked," pending further proceedings on remand before the Commission.[32]

The Court of Appeals' action is plainly consistent with all applicable statutory law and prior rulings of this Court. Under Title 28, United States Code, § 2342, the Court of Appeals has full jurisdiction to "enjoin, set aside, suspend (in whole or in part)" all orders and decisions of the Interstate Commerce Commission. Since the railroads' *"remedial"* special rate increases on recyclables after April 16, 1979—and the Commission's approval of some of those increases—*were based on the Commission's April 16, 1979 rulings in Ex Parte 319 under Section 204 of the 1976 Act,* the Court of Appeals, *acting as a reviewing court under Section 204(d),* plainly had the right to set aside and vacate those portions of the Commission's orders upon which the new, special, discriminatory rate increases were

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[32] Appendix B to petition for certiorari.

based, and to order the revocation of those illegal increases.

It is, of course, "the duty of a reviewing court to determine whether the course followed by the Commission [was] consistent with its mandate from Congress" (*Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 806, 93 S.Ct. 2367, 2374 (1973); *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U.S. 671, 691, 63 S.Ct. 1296, 1307 (1943); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-169, 83 S.Ct. 239, 245-46 (1962)). If the reviewing court determines, as the Court of Appeals did in the case at bar, that the Commission—and, in turn, *the railroads acting pursuant to the Commission's rulings*—have seriously violated the Congressional mandate contained in the governing statute, then patently *the reviewing court has full power in equity to proscribe further, continuing violations of law and the infliction of irreparable damage by enjoining both the Commission and the railroads until appropriate corrections can be made by the Commission on remand* (*Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade, supra,* at 412 U.S. 819, 93 S.Ct. 2380-81; *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 10, 62 S.Ct. 875, 880 (1942)).

As this Court stated in *Wichita Board of Trade, supra,* "such a power must be inferred from Congress' decision to permit judicial review of the agency action" (412 U.S. 819). And, as this Court stated in *Scripps-Howard, supra,* at 316 U.S. 10:

> "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made."

Thus, this Court concluded in *Wichita Board of Trade* that reviewing courts have the ancillary equitable power to enjoin railroads from implementing new rates or rate increases, when those new rates or rate increases are based on final Commission rulings which are found to be unlawful by the reviewing court in cases such as the case at bar (see 412 U.S. 819-820). This Court cautioned that a reviewing court's "power to enjoin rates, in order to protect its jurisdiction to review Commission orders, must . . . be exercised with great care," but this Court simultaneously made it completely clear that, under unique, compelling circumstances such as those involved in this case, the reviewing court can and should act decisively to preserve the integrity of the Congressional mandate contained in the governing statute (here, Section 204 of the 1976 Act), and to protect its own jurisdiction as a reviewing court.

Indeed, in cases such as this, this Court has emphasized that reviewing courts may adjust their equitable relief to fit the exigencies of the case and "to secure a just result with a minimum of technical requirements" (*Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373, 59 S.Ct. 301, 307 (1939)). They may exercise their equitable powers to provide an effective, fair remedy, so long as they stay within the bounds of the statutes before them (*Indiana & Michigan Electric Co.* v. *Federal Power Commission,* 163 U.S. App. D.C. 334, 344, 346, 502 F.2d 336, 346 (1974); *Sharon Steel Corporation* v. *Environmental Protection Agency,* CCA3, 1979, 597 F.2d 377, 381). Here, the Court of Appeals' order, which directed the *removal* of unlawful, discriminatory rate increases imposed on shippers of recyclable materials during the review process—on top of unlawful, discriminatory base rate structures condemned by the Commission's decision-on-review—is well within the bounds of the statute

which was before the Court of Appeals (Section 204 of the 1976 Act). Indeed, the Court's removal order was actually mandated by Section 204 in light of the emergency circumstances created by the railroads' unlawful rate increase binge, diabolically contrived allegedly "to remedy" the existing unlawfulness laid bare by the Commission's decision-on-review.

The Court of Appeals thus acted properly, and with caution only after this case had been before the Commission and the courts for almost five (5) years of continuous investigation and litigation and only after two (2) successive judicial review proceedings. The Court of Appeals' action was totally necessary, unavoidable and imperative to prevent severe irreparable damage to shippers of recyclables throughout the United States and to all of the vital public interests involved in the promotion of maximum recycling of crucial raw materials.

Moreover, the full propriety of the Court of Appeals' action was immediately reinforced by Congress itself when it enacted Section 204 of The Staggers Rail Act of 1980 this past October. Like the Court of Appeals, Congress rejected the 180% maximum standard of reasonableness established by the Commission which licensed the illegal rate increases struck down by the Court of Appeals' order—and Congress, like the Court of Appeals, ordered the railroads, within ninety (90) days, to effectuate additional rate reductions for recyclables and thereafter to maintain a "cap" on rates for recyclables.

Furthermore, the Court of Appeals had clear authority to "compel agency action unlawfully withheld and unreasonably delayed" under 5 U.S.C. 706. In *Arrow Transportation Co.* v. *United States,* D.C. Ala. 1959, 176 F.Supp. 411, 421, *aff'd.* 361 U.S. 353, 80 S.Ct. 406 (1960), a case somewhat similar to the case at bar, Congress directed the Commission in the Transporta-

tion Act of 1940 to establish reasonable, nondiscriminatory rates for shippers of grain. After eight (8) years of fruitless litigation, a federal court in Alabama issued an order compelling the Commission to establish such rates without further delay in line with the Congressional mandate. Upon appeal, this Court affirmed the ruling of the Alabama district court (361 U.S. 353).

II. Since The Rate Increases Revoked By The Court Of Appeals In This Case Were Unlawfully Imposed By The Railroads Improperly "To Remedy" Unlawfulness In The Base Rate Structures For Recyclables Condemned By The Commission Itself In Its Decision Of April 16, 1979, After A Lengthy Investigation Under Section 204 Of The Railroad Revitalization And Regulatory Reform Act, This Court's Decisions In *SCRAP I* And *SCRAP II* And Their Progeny Are Totally Inapposite To This Case, And They Afford No Basis For Certiorari Here.

The railroads' reliance on this Court's decisions in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 83 S.Ct. 984 (1963), *United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669, 93 S.Ct. 2405 (1973); *Aberdeen & R.R. Co.* v. *S.C.R.A.P.* (*SCRAP II*), 422 U.S. 289, 95 S.Ct. 2336 (1975) and *Southern Ry Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 99 S.Ct. 2388 (1979) is clearly totally misplaced. Under the circumstances of this case, none of those decisions are apposite.

First, all of those cases—*Arrow* through *Seaboard*—involved proceedings under Section 15 of the Interstate Commerce Act, *not* proceedings under Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, the statute before the Court in this case.[33]

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[33] *Arrow*, *SCRAP I* and *SCRAP II* involved procedings under § 15(7) of the Commerce Act. *Seaboard* was before the Court under § 15(8) of the Commerce Act. Neither *SCRAP II* nor *Seaboard* involved the issuance of injunctions, so clearly, they are not appposite here in any respect.

Secondly, this Court summarized the rule of *Arrow, SCRAP I* and their progeny as follows, in its decision in *SCRAP II,* at 422 U.S. 317, as follows:

> "The rule of *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658 . . . and *SCRAP I* is one barring courts from entering disruptive injunctions against collection of rates *not finally declared lawful or unlawful by the ICC.*" [Italics supplied.]

In *Arrow,* the Court explained that this rule was necessary in proceedings under § 15(7) of the Commerce Act because that statute granted the Commission exclusive power to suspend a rate change for a limited period of seven (7) months only until the Commission ruled on the lawfulness of the proposed change. Thus, if courts were allowed to issue injunctions at or before the end of the seven-month period, § 15(7) would automatically be amended by judicial fiat to extend the suspension period otherwise strictly limited by Congress before the Commission completed its review of the lawfulness of proposed rate changes under § 15 (see 372 U.S. 662, 667).

But, none of these rulings have any relevance whatsoever to the case at bar. As stated above, this is *not* a case under § 15 of the Commerce Act—and we are *not* concerned here merely with the Commission's limited *"suspension powers"* under that statute. Nor is this a general rate increase case applicable to commodities *generally,* in which the Commission has *not* determined, and usually does not determine, the *lawfulness* of a proposed rate or *general* rate increase as they apply to *any particular* commodity, such as recyclables. On the contrary, in this case:

1) Congress enacted a special statute—Section 204 of the 4R Act of 1976—to mandate the expeditious *removal* of all unlawful, unreasonable, discriminatory

rates and rate increases for recyclable commodities *in particular*;

2) Pursuant to that statute, the Commission conducted a lengthy, five-year investigation into the rate structures for recyclables *in particular,* and ruled on April 16, 1979, at the end of that investigation, that rates for numerous classes of recyclables were discriminatory, unreasonable and *unlawful.* Thus, the Commission, in line with Section 204 of the 4R Act of 1976, ordered the railroads to *remove* such *unlawful* rates from the rate structures;

3) The railroads thereupon allegedly proceeded *"to remedy"* such *unlawfulness* by inflicting a rapid-fire series of crushing, new, discriminatory rate increases on said recyclables *while the Commission's final decision under Section 204 was before the Court of Appeals for review under Section 204(d), thus seriously exacerbating the existing unlawfulness before the Court of Appeals could possibly complete the review process*;

4) Therefore, the Court of Appeals, in order to protect its own jurisdiction, to preserve the integrity of the Congressional mandate for *removal* of such unlawful rates and rate increases contained in Section 204, and to prevent further irreparable damage to shippers of recyclables and all the public interests involved in recycling of critical resources, necessarily and unavoidably ordered the *removal* of such unlawful rate increases pending correction by the Commission of its rulings of April 16, 1979 upon further remand.

A fortiori, this case differs from *Arrow, SCRAP I, SCRAP II* and their progeny as day differs from night. In fact, Congress enacted Section 204 of the 4R Act in response to this Court's rulings in *SCRAP I* and *SCRAP II* to compel the ICC thoroughly to investigate all rates and rate increases for recyclables;

to decide which rates were unlawful, unreasonable or discriminatory; and to remove all such unlawful rates from the rate structures. It would thus be ironic indeed if, after almost five (5) years of litigation under that remedial statute, this Court reverted to *SCRAP I* and *SCRAP II* to delay or nullify effective rate relief thereunder.

III. The Rate Increase Removal Order, Issued By The Court Of Appeals Under Section 204 Of The 1976 Act, Is Fully Supported By The Findings Contained In The Court's Detailed Decisions In This Case; Clearly It Was Properly Issued To Correct The Evils Of The Railroads' Unlawful Conduct And To Promote The Equities And Public Interests Embodied In The Statute It Sought To Enforce.

The challenged rate increase removal order was issued by the Court of Appeals as aforesaid after almost five (5) years of continuous litigation and two (2) successive review proceedings before that Court in this case. Said order is supported by all the detailed findings contained in the Court's initial decision in *National Association of Recycling Industries, Inc.* v. *ICC (NARI I)*, 585 F.2d 522 (1978), *cert. den.* 440 U.S. 929, 99 S.Ct. 1266 (1979), by the Court's second decision of April 25, 1980 (*NARI II*), and by the Court's detailed order of August 15, 1980 itself (Appendix B).

The Court's order is also supported to a major degree by the findings and decisions of the District of Columbia and Eighth Circuits in two related cases, the rulings in both of which directed that certain of the post-April 16, 1979 rate increases for recyclables challenged in those cases be *remedied* in this case, since they were imposed pursuant to the Commission's April 16, 1979 decision in this case (*National Association of Recycling Industries, Inc.* v. *ICC* (*NARI III*), D.C. Cir. Nos. 78-1680 and 2074, 4/25/80; *Union Electric*

Company v. *United States; National Association of Recycling Industries, Inc.* v. *ICC*, (*NARI IV*), CCA8, 1980, 626 F.2d 1348).

Thus, it is really specious for the railroads to contend that the Court of Appeals' removal order is not adequately supported by findings.

Moreover, the record clearly demonstrates that the Court of Appeals issued said order to enforce and effectuate the *rate removal* directives of the statute before it (Section 204); to correct the evils of the railroads' unlawful conduct in response to the Commission's decision of April 16, 1979 (*United States* v. *United Liquors Corporation, et al.*, 77 S.Ct. 208 (1956); and to promote the public interests embodied in Section 204 of the 1976 Act.[34]

The record before the Court of Appeals showed that, since at least 1967, the railroads had enjoyed incalculable millions of dollars in benefits siphoned from the nation's recycling industry in the form of unreasonable, discriminatory, unlawful freight rates during a period when the ICC refused even to investigate the rate structures.[35] Having found that shippers of recyclables had been subjected to such costly, depressing, illegal conduct for years, the Court concluded there was no equitable basis whatsoever to support the railroads' imposition of additional, huge, unlawful rate increases under the guise of "*remedying*" past illegalities.

In this regard, it seems appropriate to point out that, while both the Court of Appeals and the Chief Justice

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[34] The Court of Appeals detailed its findings regarding the public interests embodied in Section 204 in its decision in *NARI I*, at 585 F.2d 531. They include energy and natural resource conservation through recycling of industrial materials, alleviation of solid waste disposal problems and costs through recycling, etc. (see 585 F.2d 531).

[35] See *NARI* v. *ICC, supra*, at 585 F.2d 522, 525-530.

of this Court denied the railroads' application for stays of the Court of Appeals' removal order in this case, the railroads have not yet complied with that order and they continue today to collect the unlawful rate increases removed by the Court of Appeals' order, almost three (3) months after the Court of Appeals issued said order on August 15, 1980.

Even more regrettable is the fact that the Commission itself has so far failed and refused to require the railroads to publish new tariffs which remove the unlawful increases, albeit the Commission was formally petitioned to do so several weeks ago, after the Chief Justice denied the railroads' application for a stay as aforesaid.

Thus presently, the railroads have not lost millions of dollars as a result of the challenged order, as they allege in the petition for certiorari, but shippers of recyclable materials throughout the nation are still paying the unlawful rate increases the Court of Appeals ordered removed.

CONCLUSION

The petition for certiorari should be expeditiously denied.

Respectfully submitted,

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November, 1980

APPENDIX I

Calendar No. 502

96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-470

RAILROAD TRANSPORTATION POLICY ACT OF 1979

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1946

TO REFORM THE ECONOMIC REGULATION OF RAILROADS, AND FOR OTHER PURPOSES

December 7 (legislative day, November 29), 1979.—
Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
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TRANSPORTATION OF RECYCLABLE COMMODITIES

This section places an upper limit on rates to be found reasonable for recyclable commodities that would equal the level established under section 102 of the bill. This level would be recomputed each year by the Commission, and the maximum level of reasonableness for recyclables would be adjusted to reflect the annual adjustments under section 102.

It has been an established national policy, since at least 1965, to encourage and assist in the development and promotion of the collection, transportation, processing and

industrial utilization of recyclable materials. Beginning with the Solid Waste Disposal Act of 1965, Congress directed the Environmental Protection Agency to investigate the effects of existing Federal programs and policies on industrial recycling and to recommend what might be done to eliminate or moderate all Federally sponsored disincentives to the reuse, recycling and conservation of materials.

In 1970 Congress passed two additional statutes, the National Environmental Policy Act and the National Materials Policy Act. Together these acts reinforced the National Policy on recyclable materials by directing all Federal agencies to use every practicable means to enhance the quality of renewable resources and to obtain maximum recycling of depletable resources. Additional legislation expressing this national policy include the Resource Conservation and Recovery Act of 1976, the National Energy Conservation Policy Act of 1978, and the Energy Tax Act of 1978.

The freight rate issue has been a key in legislation attempting to encourage increased recycling as a way to mitigate the problem of energy and resource conservation. Rail freight rates are an important factor in the economics of recycling. Often the rates on these commodities equal or substantially exceed the value of the recyclable materials and thereby make it economically impossible for these materials to be marketed competitively. This is inconsistent with the national interests incorporated in and comprise the focal point of the energy resource legislation described above.

This Committee and Congress, through section 603 of the Regional Rail Reorganization Act of 1973 and section 204 of the 4R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless

such rate disparities were cost justified, they were to be eliminated without regard to the railroads' general revenue needs.

The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978. In response to the court's remand of the Interstate Commerce Commission recently proposed to place a "cap" on freight rates for recyclables at 180 percent of variable cost. At the time this "cap" was imposed it exceeded the average revenue/variable cost level for all traffic moving by rail by 53 points, the rebuttable market dominance presumption under the Commission's rules by 20 points and approximately 30 points above the reasonable levels that would be fixed by section 102 of S. 1946. The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed cap. It is therefore the Committee's belief that after a full 6 years since the clear mandate to remove those economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory proscription.

The Committee's provision is quite simple: it merely reduces the Commission's cap on recyclables from the 180 percent revenue/variable cost ratio level to the ratio level established by section 102 of S. 1946.

At the estimated level of 140 percent to 160 percent, to be established under this section, the railroads would receive revenues that exceed their variable costs by 40 percent to 60 percent and at that level they should be able to make a profit on this recyclable traffic. At this level,

neither the railroads nor any other traffic will be "subsidizing" recyclables. This traffic will be paying its full way—including all costs, plus a reasonable rate of return to the railroads.

It is the Committee's intent that the railroads be afforded their full cost plus a reasonable return on the movement of recyclables and therefore the applicable ratio under this provision will be recomputed by the Commission each year, just as the same ratio is to be recomputed annually under section 102 of the bill. This level, however, will represent a "maximum level of reasonableness" for recyclables, and as long as rates charged for the transportation of these materials of such vital importance to the United States are at this level, there can be no further rate increases above such revenues to variable cost ratios.

APPENDIX II

SCHEDULE OF SPECIAL, DISCRIMINATORY RATE INCREASES IMPOSED BY THE RAILROADS ON RECYCLABLES AFTER APRIL 16, 1979, IN RESPONSE TO THE COMMISSION'S FINAL DECISION IN *EX PARTE 319*, WHILE THIS CASE WAS PENDING BEFORE THE COURT OF APPEALS ON REVIEW AND WHICH WERE REVOKED BY THE COURT OF APPEALS' ORDERS OF APRIL 25 AND AUGUST 15, 1980

A. Special, Discriminatory Rate Increases Imposed In General Rate Increase Proceedings Since April 16, 1979

Since April 16, 1979, when the Commission rendered its decision in *Ex Parte 319*, the railroads have imposed the following special, discriminatory rate increases on recyclables in the course of general rate increase proceedings:

Date	General Rate Increase Proceeding	Special Rate Increases On Recyclables
5/18/79	*Ex Parte 349 (Sub 1)*	The general rate increase applicable to other commodities was 4% in the East and 2% in the South. However, the railroads imposed a special, discriminatory 10% rate increase on wastepaper and textile waste in East only. This special rate increase did not apply to competing virgin wood chips or woodpulp, and whereas it was supposed to apply to one of the competing virgin commodities on an equal basis (pulpwood), the Commission suspended its application to pulpwood while it was fully applicable to wastepaper and textile waste from the very beginning.
10/1/79	*Ex Parte 368*	The general rate increase on all commodities was only 7.4%, but the railroads inflicted the following special, discriminatory rate increases on recyclables:

Date	General Rate Increase Proceeding	Special Rate Increases On Recyclables	
10/1/79— cont'd.	*Ex Parte 368*— cont'd.	*Wastepaper*	—9% (East); 18.8% (West)
		Textile Waste	—15% (East); 13.8% (West)
		Rubber	—15% (East); 13.8% (West)

In addition, in *Ex Parte 375 (Sub 1)*, the railroads sought to impose the following additional special, discriminatory rate increases on recyclables in the course of that general rate increase proceeding, where the general rate increase applicable to most other commodities was only 4% (*Ex Parte 375*):

Recyclables	Proposed Special Increases In Addition To 4% General Rate Increase	Railroad Territories
Iron & steel scrap	14.3%	West and East-West
Aluminum scrap	6.9%	East
Aluminum residues	14.3%	East
Misc. nonferrous metal residues	9.5%	West and East-West
Misc. nonferrous metal residues	2.9%	East
Textile waste	13.3%	West and East-West
Textile waste	14.3%	East
Wastepaper	13.3%	West and East-West
Wastepaper	5.7%	South and Southwest
Wastepaper	14.3%	East-South
Wastepaper	14.3%	East
Rubber	6.7%	West and East-West
Rubber	9.5%	East
Zinc residues and drosses .	2.9%	East
Copper scrap	2.9%	East
Lead, zinc scrap	2.9%	East
Lead matte	7.6%	East-South
Copper matte	7.6%	East; West; East-West
Copper matte	7.6%	East-South

In its decision of July 3, 1980 in *Ex Parte 375 (Sub 1)*, the Commission suspended the last-mentioned special rate increases on recyclables for investigation, stating:

> "2. *Recyclable Materials*
>
> "Under 49 U.S.C. § 10731, when appropriate, the Commission must determine whether general rate increases affect any part of the rate structures for the transportation of recyclable or recycled materials and competing virgin materials in a manner that causes unlawful discrimination under 49 U.S.C. § 10741. In compliance with judicial remand, the Commission will soon consider the maximum reasonable rate levels for recyclables and the remedy for discrimination between these commodities and virgin materials. Once we issue our decisions in these areas, we will be in a position to evaluate the lawfulness of the increases proposed here. Accordingly, we order that the increases on iron and steel scrap and other recyclable commodities . . . be suspended and investigated."

B. Additional Special, Discriminatory Rate Increases On Recyclables Imposed Outside General Rate Increase Proceedings Since April 16, 1979

In addition to the foregoing special rate increases imposed on recyclables in general rate increase proceedings before the Commission since April 16, 1979, in response to the Commission's decision in *Ex Parte 319*, the following special individual rate increases have been imposed by the railroads on recyclables or same were pending for imminent imposition at the time of the Court of Appeals' revocation orders:

Individual Rate Increase Action	Rate Increases	When Approved And/Or Effective
SFA 5121	7% wastepaper, South	*Approved* by Southern Freight Ass'n.; effective 12/22/79
TEA 888-8-18 ...	15-30% nonferrous metal scrap in East, albeit ratios already at or above 180% in this case [1]	*Approved* 12/7/79; Published 2/22/80
SWL C-71-204 ...	7% increase on wastepaper within Southwest. Contrary to railroads' claim, this increase was *not* limited to Texas only	*Approved* by Western Traffic League 11/21/79; effective 3/15/80
SFA 5693	10% increase on wastepaper, South to Southwest	*Approved* by Southern Freight Ass'n. 3/28/80
SFA 5873	10%, wastepaper (South & East)	*Approved* by Southern Freight Ass'n. 3/28/80
SFA 5666	8%-32% increase on wastepaper shipments, South and Illinois	*Approved* by Southern Freight Ass'n. 3/28/80
SFA 5694-98	17% increase on textile waste	*Approved* in all five (5) cases on 3/28/80

[1] This rate increase action resulted from the Eastern Railroads' cancellation of rates of 40,000 lb. and 60,000 lb. minimum weight shipments of nonferrous metal scrap in East and from East to points east of the Illinois-Indiana State line. Thus, shippers of recyclable nonferrous metals must now pay *30%* higher rates to ship 40,000 lbs.; *15%* higher rates to ship 60,000 lbs. at these higher minimum weight levels.